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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 452

THE VILLAGE OF SKOKIE, ILLINOIS,
Petitioner,

vs.

THE FIRST NATIONAL BANK AND TRUST COMPANY, OF RACINE, WISCONSIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Brief	6
Jurisdictional Statement	3
Opinion of the Court of Appeals	37
Opinion of the District Court	33
Petition	1
Questions Presented	3
Reasons Relied On for Allowance of the Writ	4
Summary and Short Statement	1

List of Authorities Cited.

City of Alton v. Foster, 207 Ill. 150, 69 N. E. 783	8
City of Chicago v. Brede, 218 Ill. 528, 75 N. E. 1044	10
City of Pontiac v. Talbot Paving Co., 94 Fed. 65	7
Continental Casualty Co. v. First National Bank of Temple, 116 Fed. 2nd 885	28
Conway v. City of Chicago, 237 Ill. 128, 86 N. E. 619	12
Donahue v. Village of LaGrange, 263 Ill. 607, 105 N. E. 762	12
Farrell v. City of Chicago, 198 Ill. 558, 65 N. E. 103	12
Fidelity Trust Co. v. Village of Stickney, 129 Fed. 2nd 506	12
McCandless v. United States, 298 U. S. 342	29
Midland Lumber Co. v. Dallas City, 276 Ill. 172, 114 N. E. 580	12
National Protective Legion v. Village of Brookfield, 228 Ill. App. 311	11
Rothschild v. Village of Calumet Park, 350 Ill. 330, 183 N. E. 337	12

Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906.... 28
Village of Hartford v. First National Bank of Wood River, 307 Ill. App. 447, 30 N. E. 2nd 524..... 30
28 U. S. C. A. 1254 (1)..... 3
Ill. Rev. Stat. 1951, Chap. 24, sec. 84-73..... 7
Ill. Rev. Stat. 1951, Chap. 24, sec. 84-86..... 7
Ill. Rev. Stat. 1951, Chap. 24, sec. 84-89..... 20
Ill. Rev. Stat. 1951, Chap. 24, sec. 84-90..... 1-7

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SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The suit is brought by the First National Bank and Trust Company of Racine, Wisconsin, as the holder of special assessment bonds issued pursuant to the Local Improvement Act of the State of Illinois, against the issuing municipality, Village of Skokie, Illinois. The suit involves the liability of the muncipality to the bondholder for money allegedly collected by the municipality from property owners in payment of the special assessment.

The Illinois statute involved is the following section of the Local Improvement Act:

(No claims except against the assessment.) No per-

son accepting the vouchers or bonds as provided in this article shall have any claim or lien upon the municipality in any event for the payment of his vouchers or bonds or the interest thereon, except from the collection of the assessment against which the vouchers or bonds are issued. The municipality, nevertheless, shall not be in any way liable to the holders of these vouchers or bonds in case of a failure to collect the assessment, but with all reasonable diligence, so far as it can legally do so, it shall cause a valid special assessment or assessments, a special tax or taxes, as the case may be, to be levied and collected, to pay these bonds and vouchers, until all bonds and vouchers are fully paid. Any holder of vouchers or bonds, or his assigns, shall be entitled to summary relief by way of mandamus or injunction to enforce the provisions of this section. (Ill. Rev. Stat. 1951, Chap. 24, Sec. 84-90.)

The suit was referred to a special master in chancery who found that the respondent had satisfactorily proved the collection of money by the petitioner and was entitled to judgment. The District Court sustained the petitioner's exceptions to the master's report, holding as a matter of law that the evidence upon which the master's report was based was inadmissible and that without this inadmissible evidence the respondent had failed to prove the collection of cash.

On appeal by the respondent the Court of Appeals pronounced a "trust accounting" theory entirely new to the special assessment law of Illinois, held that the disputed evidence was sufficient to establish the collections, reversed the judgment of the District Court, and directed the entry of judgment in accordance with the master's report.

BASIS ON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. A. Sec. 1254 (1) and that part of Rule 38.5 (b) of this Court which includes a decision of a Court of Appeals on an important question of local law in a way probably in conflict with applicable local decisions.

The petitioner's petition for rehearing was denied on August 31, 1951.

The questions involved are substantial because the decision creates a new "trust accounting" doctrine of municipal liability which will apply to every municipality in Illinois with outstanding special assessment bonds. The importance of the decision is evidenced by the fact that the Illinois Municipal League sought leave to intervene in the Court of Appeals in an effort to have the decision modified.

THE QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in creating the "trust accounting" theory of municipal liability and thus creating an "event" in which the municipality becomes generally liable on special assessment bonds without affirmative proof of collections and despite the Illinois Local Improvement Act and the court decisions that the municipality shall not be liable "in any event" except from actual cash collections.

2. Whether the municipality can be held liable on purely opinion evidence, either on a "trust accounting" theory or any other theory.

3. Whether the Court of Appeals erred in denying the petitioner's cross-appeal.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. Under the Illinois Local Improvement Act the installation of an improvement for a particular locality within a municipality is specifically made a matter of private benefit and private liability for the owners of the property thus improved. The legislature has provided that the holders of the special assessment bonds shall have no claim or lien against the municipality *in any event* except from the money actually collected in payment of the special assessment. The courts of Illinois have uniformly required the bondholder to prove affirmatively that the municipality has collected money of which he has not received his share. The federal courts have fully respected this legislative intention. The decision in this case through the "trust accounting" theory casts the burden of disproving collections on the municipality and thus creates an "event" in which the municipality can become generally liable for money which it did not collect, solely as a result of the inconclusiveness of the municipal records. The decision is in conflict both with the applicable decisions of the courts of Illinois and with the prior decisions of the federal courts.

2. The decision of the Court of Appeals sets a legal standard of proof by opinion evidence which is in conflict not only with the applicable decisions of the courts of Illinois but also with decisions of both the federal courts and the courts of all other states.

3. The decision of the Court of Appeals fails to recognize that municipal liability cannot be created by an admission by counsel of a liability later shown not to exist, and that costs should not be assessed where there is no liability, as urged in the petitioner's cross-appeal.

THE OPINIONS.

The opinion of the District Court was not printed and the opinion of the Court of Appeals has not as yet been printed. Copies of both opinions are set forth in the appendix to this petition.

CONCLUSION.

The petitioner respectfully prays that it be granted a writ of certiorari directed to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

I.

THE LIMITED LIABILITY OF A MUNICIPALITY TO PAY SPECIAL ASSESSMENT BONDS OUT OF SPECIAL ASSESSMENT COLLECTIONS CANNOT BE CONVERTED INTO A GENERAL LIABILITY EXCEPT BY AFFIRMATIVE PROOF THAT THE COLLECTIONS HAVE BEEN MADE.

The basic purpose of the Illinois Local Improvement Act is not to provide a method for financing general municipal improvements, but is rather to provide a method by which the owners of property in a particular *locality* within a municipality may secure an improvement not common to the municipality as a whole. A local improvement is not made for the benefit of all of the citizens, nor is it inaugurated by the municipality. Be it a water main, a sidewalk, a sewer or a pavement, the impetus for installation comes from the owners of the abutting property which will be benefited. Local improvements are a matter of private benefit for those whose property is served by the water main, the sidewalk, the sewer or the pavement.

The improvement in this case is a sewer system. It is a large improvement, benefiting about one third of the property in the village, but it is nevertheless a *local* improvement with no direct benefit to the other two-thirds of the village.

The private nature of the benefit is the basic reason why the Illinois legislature provided that the cost shall not *in any event* become a public charge except for money actually collected. A municipality does not pledge its credit for the payment of special assessment bonds. Every bond is made "payable solely out of said installment when col-

lected." Ill. Rev. Stat. 1951, Chap. 24, sec. 84-86. A municipality normally delivers the bonds to the contractor who installs the improvement in payment for his work. Payment of the bonds is a matter between the owners of the assessed property and the contractor or those to whom he sells the bonds. The municipality acts only as the agency to which payments are made and by which cash collections are distributed.

The Illinois Local Improvement Act makes clear, even emphasizes, this basic concept of limited municipal liability. It provides that neither the contractor nor the bondholder shall have "any claim or lien against the municipality in any event" except from the actual collection of the assessment. Ill. Rev. Stat. 1951, Chap. 24, sec. 84-73, 84-90.

For over fifty years special assessment bondholders have tried various schemes and theories to circumvent the plain language of the statute that they shall have no claim against the municipality *in any event* except for payment from collections. The only cases in which the bondholders have been successful are those in which they affirmatively proved the collection of cash which had not been distributed to them. Without such affirmative proof both the courts of Illinois and the federal courts have uniformly refused to convert this special liability into a general liability of the municipality.

The earliest federal court case is *City of Pontiac* v. *Talbot Paving Co.*, 94 Fed. 65, which was decided in 1899 by the Court of Appeals for the Seventh Circuit. The plaintiff was the contractor who installed the improvement. For his work he was given vouchers payable out of the special assessment collections. The ordinance providing for the special assessment was later held invalid and no

collections were made. The plaintiff sued the city at law, and recovered judgment in the trial court. The opinion reversing the judgment contains the following:

> "The statute which confers authority for making the improvement in question imperatively requires that the expense, aside from street intersections, shall be borne by the abutting property, through special assessment, and shall not become a public charge 'in any event.' The provision is of general application to cities and villages in the state of Illinois, and is in accord with a rule of public policy which is common in municipal charters and is upheld by judicial authority. If, however, the contractor who performs work so authorized, has the right to recover the contract price against the municipality, by way of damages, in the event of neglect or refusal on the part of the public officers to perform their duty in enforcing the special assessments, the way is clearly open to evade and nullify the legislative purpose. By their conduct —either through negligence, ignorance, or collusion— the city council or officers may impose upon the public the expense of the improvement, in despite of the statute which declares it a special benefit to be paid exclusively by abutting lot owners. (p. 68.)
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> * * * * *
>
> "* * * we are clearly of the opinion that no general doctrine of municipal liability for mere nonfeasance in the failure or neglect of council or officers to perform a duty of the municipality can be extended to override *per se* the inhibitions expressed in this statute, and that the contractor must proceed by mandamus to enforce his claim. The decisions in support of this view are well considered, and apparently without conflict. * * *" (p. 69.)

Under a similar set of facts the Supreme Court of the State of Illinois in the case of *City of Alton* v. *Foster*, 207 Ill. 150, 69 N. E. 783 (1904), reversed a judgment in favor of a contractor for the amount due him for the installation

of a local improvement. The following statement is taken from the decision:

"The ground of recovery insisted upon is the neglect and refusal of the city council of the appellant city to levy and collect, or make some effort, at least, to do so, a new or supplemental special assessment upon the property benefited, to meet the deficit above mentioned. The question is, then for the first time directly presented to this court, whether, under an ordinance and contract and the statute, all providing that the city shall not be liable to the contractor for the amount to be raised by special assessment, the city may nevertheless be held liable for such deficit, upon the ground that its officers and agents have neglected or refused to levy such special assessment. No reason is suggested why the city might not, by the ordinance, provide for the exemption claimed, or that the contractor has not made a valid and binding contract upon a sufficient consideration, or that there is any public policy or constitutional inhibition against the restriction of the right as found in the statute quoted; but, notwithstanding the plain language of the ordinance, the contract, and the statute that the city shall not be liable for such special assessment in any event, it is sought to read into the contract an exception to the terms and provisions of the ordinance, the statute and the contract itself, not there contained, and to declare that there is an event that may arise, and has arisen, namely, the failure and refusal of the city council to proceed to levy the new assessment, by which the appellant city becomes liable. The inauguration of the system of local improvements by special assessments was doubtless designed to enable localities requiring them, and able to build and pay for the same, to have improvements not common or general to the city, and for which the city generally would not need to incur an obligation or direct liability. From such local improvements the citizens generally, and those remote from the improvement, receive little or no benefit, and usually the portion that the public

pays for by general taxation is at the street intersections and the places exclusively the property of the public, and not bounding the property of any individual, and, as at present, the cost of the proceedings and collection of the assessment; and it would seem to be an injustice to the public or general taxpayers, of the city, if the municipality and the contractor could by some act, as between themselves, or by the failure of one or the other to do some act required by the contract or the law, render the general taxpayers, or the general fund of the city, which is derived from the general taxpayers, liable upon a contract for which the city was not primarily liable, and which it was expressly agreed it should not be liable for in any event. It must be apparent that, if such rule be adopted, such municipalities may become the easy prey of negligent or corrupt councils, and, under the guise and form of local improvements by special assessments, such improvements may be made in such localities as favoritism or other motive may direct, and the feigned or actual neglect or obstinacy of the official representatives of the municipality place upon the city the entire burden of the cost thereof." pp. 160-162.

The case of *City of Chicago* v. *Brede*, 218 Ill. 528, 75 N. E. 1044 (1905), was one in which a taxpayer sought to enjoin the expenditure of $150,000.00 by the Board of Local Improvements of the City of Chicago for the purchase of improvement bonds issued in anticipation of the collection of special assessments. The City had passed an ordinance authorizing "special funds to be used for the purchase of bonds, coupons, vouchers, when the respective funds against which bonds had been issued were exhausted and deficiencies arose on account of delays in collection." These bonds were to be deposited in special funds to be later reimbursed upon collection of the assessments. The city contended that the purpose of the stabilization fund was to preserve the integrity of its paper and its credit. The

Supreme Court in denying the City's appeal from the granting of the injunction said:

> "It will be seen from these provisions of the statute that it was the evident purpose and intention of the Legislature to in no way hold the city responsible or liable for the vouchers, bonds or interest. This is a positive statutory provision, which would have priority over paragraph 3 of section 62, art. 5, c. 24, as quoted by appellants. The city is powerless by any ordinance which it might pass to make itself liable in the face of the express provisions of the statute. While it might be of advantage to the city, and save money to the property owners and taxpayers, for the city to assume responsibility for the bonds thus issued, yet, in the absence of legislative authority, it is powerless so to do." p. 536.

The case of *National Protective Legion* v. *Village of Brookfield*, 228 Ill. App. 311 (1923), was a suit by the owner of special assessment bonds asking to make the municipality liable for a general judgment by reason of the fact that the attestation clause on the bonds recited "that the good faith and credit of the Village of Grossdale is pledged for the prompt fulfillment of the above promise." On appeal from judgment for the plaintiff, the judgment was reversed with the opinion containing the following statement:

> "From these rulings we infer that the judgment is based upon the theory that plaintiff was not under the necessity of proving the collection of the assessment in question, and that the variances from the form described by the statute had the effect of making the bonds a general liability on the part of the village. Both of these propositions are untenable.
>
> "The bonds by their terms were payable from the proceeds of the special assessment against which they were issued and the liability of the village is limited to the amount actually collected under the assess-

ment. Proof that there had been such collection was essential to establish plaintiff's right to recovery." p. 314.

In the case of *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 183 N. E. 337 (1932), a bondholder brought suit for a pro rata share of collections made by the village. The evidence affirmatively showed "that the village collected a part of the several installments against which defendant in error's bonds were issued" and used the money in full payment of bonds belonging to other bondholders without giving the plaintiff his prorata share of the money collected. The Court there held the plaintiff bondholder entitled to his share of the money affirmatively shown to have been collected, stating that:

> "When the defendant in error had shown that the village collected the money applicable to the payment of his bonds and had not paid them, he had met the burden imposed upon him and was entitled to judgment unless the plaintiff in error showed a valid defense." p. 342.

Other supporting cases are *Farrell* v. *City of Chicago*, 198 Ill. 558, 65 N. E. 103; *Conway* v. *City of Chicago*, 237 Ill. 128, 86 N. E. 619; *Donahue* v. *Village of LaGrange*, 263 Ill. 607, 105 N. E. 762, and *Midland Lumber Co.* v. *Dallas City*, 276 Ill. 172, 114 N. E. 580.

The most recent case and the case most directly in point on the facts and issues involved is *Fidelity Trust Co.* v. *Village of Stickney*, 129 F. 2nd 506, which was decided by the Court of Appeals for the seventh circuit in 1942. Because the case is so squarely in point and was recently decided, we include the greater part of Judge Minton's opinion:

> "The plaintiff, a resident of Pennsylvania, is the owner as trustee of five bonds, each for the principal sum of $1,000 of Series H and a like amount and num-

ber of Series I, issued by the defendant in anticipation of the collection of assessments authorized for the improvement of the streets of the Village of Stickney, Illinois. Series H contained thirty-five bonds of $1,000 each and Series I thirty bonds of $1,000 each. The bonds and interest were in default. The plaintiff brought suit, alleging that the defendant had collected the assessments; that the assessments so collected were a trust fund for the payment of the bonds; that the defendant had commingled the assessments collected with its funds, had used the collected funds for its own purposes, and had lost the same by depositing in banks that subsequently failed, and that the funds were otherwise misapplied by the defendant. An accounting and an injunction were prayed for.

"The evidence did not show that there was any appropriation of the collected assessments to pay the general obligations of the defendant. Neither was there any evidence that the funds were lost in closed banks. The general allegation of the complaint that funds collected 'have been otherwise misapplied by the defendant' is sufficient averment to support the evidence adduced in the case, so as to avoid the contention that there was a variance between the allegations of the complaint and the proof.

"The evidence showed that in each Series, H and I, six bonds had been received by the collector and cancelled. The matter was handled in two ways. First, Hammeda and Swobodka, who were not property owners whose property was liable for assessment, would buy a bond at very considerable discount. They would then turn the bond over to the village collector, whose duty it was to collect the installments under the assessment, with the understanding with the collector that the property owners designated by Hammeda and Swobodka could come in and pay a sum less than the amount of the installment due and receive a receipt in full for the installment. The collector kept track of the payments, and when a thousand dollars of installments had been liquidated, he cancelled the bond and the money that he had collected was turned over to

Hammeda and Swobodka, who made a profit. The collector received no part of the profit but he did receive some 'presents' from Hammeda and Swobodka.

"By the second method employed, Hammeda and Swobodka entered into an arrangement with the collector, which enabled them to carry out the following practice. Hammeda and Swokodka then contacted various property owners whose property was subject to the payment of the special assessments and agreed with such property owners that upon payment to Hammeda and Swobodka of such sums as the latter were willing to accept, Hammeda and Swobodka would secure for the property owners receipts showing payment in full of the various installments of the assessments against their property. Hammeda and Swobodka would then present to the collector the bills for the special assessments against the property of the owners who had made the payments to them. After marking the bills paid in full, the collector would deliver to the village treasurer as cancelled a sufficient amount of bonds belonging to Hammeda and Swobodka to equal the full amount of the installments of the assessments covered by the receipted bills. Under this method, no money came into the hands of the village collector or anyone else for the village.

"The court below found that these transactions were unauthorized by the statute. It held that the village had in effect collected the bonds in cash, and held the village liable to the plaintiff for its five-thirty-fifths part of the transaction on the Series H bonds and five-thirtieths part on the Series I bonds.

"(1) The questions presented are whether the transactions of receipting the bonds of the non-property owners, Hammeda and Swobodka, in the manner above indicated, were authorized, and if they were not, then was the village liable for the unauthorized acts of the village collector and to be charged with having collected the cash? The court below held these transactions were unauthorized and the village was liable as if the bonds had been collected in full in cash, and

gave judgment for the plaintiff's proportionate amount of the bonds, with interest and other relief.

* * * * *

"What was the liability of the village for the unauthorized handling of these transactions? In the first method, the village collector received money. How much does not appear in the record. He received the amount Hammeda and Swobodka told him to collect as against the bond or bonds handled under this method. This amount, as the master found, was probably about seventy-five per cent of the face value of the bonds.

"As to the second method, no money was received by the collector of the village. Hammeda and Swobodka had received the money in an amount undisclosed, but sufficient to satisfy Hammeda and Swobodka, who turned over to the village collector the bond or bonds for cancellation.

"(4) It has been clearly and repeatedly held by the courts of Illinois that money collected by the officers of a municipality in payment of special assessments levied for improvements constitutes a trust fund. *People ex rel. Anderson* v. *Village of Bradley*, 367 Ill. 301, 11 N. E. 2d 415; *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 183 N. E. 337; *Flanagan* v. *City of Chicago*, 311 Ill. App. 135, 155, 35 N. E. 2d 545; *Viehweg* v. *City of Mount Olive*, 298 Ill. App. 412, 19 N. E. 2d 211; *Siefker* v. *City, etc.*, 297 Ill. App. 113, 17 N. E. 2d 368; *Wells* v. *Village of Wilmette*, 193 Ill. App. 30. See also *Village of Brookfield* v. *Pentis*, 7 Cir., 101 F. 2d 516.

"(5) It seems clear to us that under the so-called first method by which money was collected by the collector of the village, the village is liable for the amount of money the collector received. This constituted a trust fund, for the integrity of which the village was unquestionably liable.

"(6) As for the balance which it did not collect, although it was its duty to collect it, the village is not liable. It could not be held its duty to preserve as

a trust fund that which it had never possessed. *Conway* v. *City of Chicago,* 237 Ill. 128, 136, 86 N. E. 619.

"(7) We come now to the second method, by which no money came into the hands of the village collector, and in which case Hammeda and Swobodka, the owners of the bond or bonds, had collected the money from the property owners in such amount as satisfied them and had then turned over the bond or bonds to the collector for cancellation. Under this method, no money came into the hands of the village collector. The trust fund theory could not apply because no fund was collected. The village collector had been guilty of an illegal act but the village, for the collector's default, neglect or mistake in the performance of his duty, cannot be held liable. This was clearly held in *Conway* v. *City of Chicago,* 237 Ill. 128, 138, 139, 86 N. E. 619, 622. This case states the rule that the liability of a municipality arising out of an assessment such as the one involved here is 'limited to the amount of the special assessments actually collected' for the improvements.

"In the *Conway* case, the city officials, acting under an erroneous view of the law, granted rebates to certain property owners. The city issued so-called abatement certificates to certain property owners and delivered these certificates to the collecting officer to be credited on the assessment owed by these property owners. The certificates were to be delivered finally to the city as so much money collected.

"In holding that the city was not liable for the amount of money represented by the certificates, the court said: 'Through a misapprehension as to the legal basis upon which the special assessment should have been levied, these rebates were left with the taxpayers. If appellant is required to pay appellee these rebates, the effect of it will be to establish a general liability against the city for the mere neglect, default or mistake of its officers in regard to the levying and collecting of a special assessment. It is true that appellant had no legal right to make such rebates, and all orders and proceedings purporting to author-

ize such rebates were null and void. * * * Appellee's remedy, in so far as the amount of these rebates is concerned, is by mandamus to compel the performance of whatever legal duties appellant is under in connection with the collection of these rebates from the taxpayers. It is suggested that difficulties arising out of the lapse of time will prevent the collection of the original assessment or the levying of a supplemental assessment covering these rebates. *However, this may be, we are not inclined to extend the general liability of a municipality for special assessments beyond that while results from a failure to pay over money actually collected by it.* These rebates never having come into the hands of the city in cash, it is not liable in an action of assumpsit for them, on the theory that by the exercise of due diligence in the discharge of its legal duties it ought to have collected them.' (Latter italics ours.)

"We therefore hold on the authority of the *Conway* case that as to those bonds delivered by Hammeda and Swobodka to the village collector for cancellation and against which no money was received by the collector, the village is not liable.

"(8) Before the trial the plaintiff filed under Rule 36 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, a request for an admission of facts. The request asked the defendant to admit that a number of bonds listed were cancelled on the dates set forth opposite the bonds listed. This the defendant admitted. But the plaintiff next asked the defendant to admit that none of these bonds were used by property owners to pay assessments. This the defendant refused to admit. This was no part of the plaintiff's prima facie case. The plaintiff made its case when it showed ownership of the bonds, maturity, collections made by the village, demand for payment and no payment. *People* v. *Village of Bradley*, 367 Ill. 301, 11 N. E. 2d 415; *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 342, 183 N. E. 337; *Allbee* v. *City of Aurora*, 306 Ill. App. 457, 28 N. E. 2d 742.

"After the plaintiff had made its prima facie case,

> it was then up to the defendant to explain what collections were made, if any, and what it did with them. If the plaintiff undertook such proof it was unnecessary and was an attempt to anticipate and forestall a position it apprehended the defendant would take. * * * The judgment of the District Court is reversed, with instructions to proceed in accordance with this opinion."

The decision in the instant case holds that the plaintiff established a prima facie case by showing ownership of the bonds, maturity, collections made by the village, demand for payment, and no payment. This statement is taken directly from point 8 of the foregoing opinion in the *Fidelity Trust Company* case where the statement was entirely correct since the village had made no payment on the plaintiff's bonds and the plaintiff had affirmatively proved by admissions of the village collector that cash had been received in payment of bills treated as paid with securities. The statement cannot be applied to the instant case in which the plaintiff's bonds had been paid down from $159,000 to $132,500 and no competent evidence was introduced to show cash collections beyond those of which the plaintiff received its share.

The instant decision then proceeds to create the "trust accounting" theory that all doubts must be resolved against a municipality which has failed to keep proper records and to explain the errors and omissions found therein. The Court of Appeals thus creates an "event" in which the limited liability of a municipality for cash actually collected can be converted into a general municipal liability, namely, in the event that the municipal officers fail to keep proper records and to explain the errors and omissions found therein.

This trust accounting theory is exactly contrary to the basic doctrine of the Illinois Local Improvement Act that

no bondholder "shall have any claim or lien upon the municipality in any event". It is exactly contrary to the decisions in all of the foregoing cases. It is, in particular, exactly contrary to the decision in the *Fidelity Trust Company* case in which the plaintiff was denied recovery on the securities transactions in which it did not affirmatively prove the receipt of cash by the village, even though the municipal records were a mass of errors and omissions far beyond anything chargeable to this petitioner.

The decision is also contrary to the *Fidelity Trust Company* case in that it fails to recognize that whatever duty there may have been to keep accurate accounts was the duty of the village collector. The established law that the municipality is not liable for the collector's default was recognized in the *Fidelity Trust Company* case with the following statement:

> "The village collector had been guilty of an illegal act but the village, for the collector's default, neglect or mistake in the performance of his duty, cannot be held liable."

Upon rendition of the Court of Appeals opinion counsel for the respondent was quoted in the press as saying: "The decision has far reaching significance, because for the first time a federal court has ruled that a municipality must keep accurate records of collections or be held responsible." The decision does indeed have far reaching significance. It vitiates the limitation in the Illinois statute that the bondholder shall have no claim or lien *in any event* except for cash actually collected. It overrules, while purporting to affirm, all the previous decisions of the Illinois courts and the federal courts. It opens the door to a threatened flood of litigation in federal courts against Illinois municipalities, a threat so definite that the Illinois Municipal League sought to intervene to have the decision modified.

II.

THE RESPONDENT'S TESTIMONY AND EXHIBITS WERE BASED ENTIRELY ON OPINION AND WERE INCOMPETENT UNDER THE "TRUST ACCOUNTING" OR ANY OTHER THEORY.

The Illinois Local Improvement Act permits the payment of special assessments by the surrender and cancellation of the special assessment bonds. Ill. Rev. Stat. 1951, Chap. 24, sec. 84-89. The petitioner's records show that 4,202 special assessment bills were paid with securities pursuant to this statute. The sole issue in the case is whether these bills were paid with securities or were paid with cash and the securities substituted as charged by the respondent.

The village collector died before the trial. The only other persons with direct knowledge of the manner in which the bills were paid were the property owners who made the payments. In a discussion as to their availability as witnesses counsel for the respondent said, "You can show 7,500 are available. I am going to call as many as this record will stand." (Tr. 474.) The respondent, however, failed to call any property owner as a witness. The respondent relied instead entirely upon the opinion evidence of Mr. Blunt. The following are examples of the type of testimony which he was permitted to give:

* * * * *

> Mr. Blunt: By examination of the books of original entry of the Village of Skokie.
>
> Mr. Lyon: I object to that as being a legal conclusion. I think he should describe the books and records rather than characterize them as the books of original entry. That is a matter of law.
>
> The Master: Overruled. (Tr. 284-5.)

* * * * *

Mr. Blunt: * * * as a result of our audit of the books of original entry and accounts of the Village of Skokie. * * *

Mr. Lyon: I move to strike the conclusion again as to the books of original entry. I will not make that objection each time if it may be understood that I object to it each time it is used in the record.

The Master: That will be understood and the ruling will be the same. Objection overruled. (Tr. 289.)

* * * * *

Mr. Blunt: This was an acceptable transaction because the name of the property owner was identifiable.

Mr. Lyon: I object to whether it is acceptable or not.

Mr. Short: It is acceptable to himself as an auditor.

Mr. Blunt: This transaction was acceptable to us.

The Master: By amending it I think it is all right. (Tr. 328.)

* * * * *

Mr. Blunt: In addition to that the elimination of $131,967.85 of improperly issued obligations set forth on page three and four of plaintiff's exhibit number 3.

Mr. Lyon: I move to strike out "improperly issued obligations" as being a legal conclusion.

Mr. Short: I think it is proper.

Mr. Lyon: It is not up to this witness to decide the law as to what is or is not a properly issued obligation.

Mr. Short: I think it is within his province to so state in reference to an exhibit the reasons why he treated certain items in certain ways.

The Master: Do you mean when you use the term "improperly issued obligations" that they were improperly issued according to your judgment?

Mr. Blunt: Yes, sir.

The Master: With that understanding he may answer. (Tr. 344-5.)

* * * * *

Mr. Blunt: * * * The issuance of a reissued bond in our opinion is not acceptable and is improper.

Mr. Lyon: I move to strike out that portion about the bond isn't acceptable and is improper.

The Master: He stated it is only his opinion.

Mr. Lyon: The witness hasn't any right to give an opinion on a question of law before the court for decision.

Mr. Short: That was in the preparation of his exhibit.

The Master: He simply answered a question as to what were reissued bonds and he stated his opinion only. (Tr. 345-6.)

* * * * *

Mr. Blunt: They are cancelled and they are no longer entitled to prorations.

Mr. Lyon: I move to strike out his conclusion that they are no longer entitled to prorations. * * * It is the opinion of the witness and not a statement of fact.

The Master: I will take it from an expert witness. He has the right to interpret and judge in the matter. (Tr. 386-7.)

* * * * *

The Master: * * * You can question him (Blunt) on what is an acceptable liquidation and what is not an acceptable liquidation. But he is an expert witness and he has the right to say whether in his judgment they are acceptable or not.

Mr. Lyon: I disagree with that. (Tr. 404.)

* * * * *

Mr. Blunt: There were quite a number of transactions where the wrong bond was applied to the wrong installment of the bill.

Mr. Lyon: I move to strike out the answer as being a legal conclusion by this witness.

Mr. Hampton: I join in that objection.

The Master: The objection will be overruled. The answer will remain in the record.

Mr. Short: Did that influence you in making your decision that in your opinion cash had been substituted for securities?

Mr. Lyon: I object to what influenced him in arriving at opinions. His job is to testify.

Mr. Short: Master, that was opened up in that manner on cross-examination. I contend that opens the door for me to explore it fully.

The Master: Well, as I remember in his explanation he stated that one fact entered into his conclusion.

Mr. Short: I don't recall that.

The Master: Let him answer if he can.

The Witness: That type of transaction wouldn't have influenced me with reference to treating these items as cash. That might have occurred as a result of an error by the Village Collector, but on the other hand, it might have been a deliberate attempt to use securities in trying to apply them to bills that were involved in so-called liquidation transactions. I cannot say what was the motivating reason.

Mr. Lyon: I move to strike out his answer as not being responsive as well as being immaterial.

Mr. Hampton: I join in the objection.

The Master: Objection overruled.

Mr. Short: Do you have an opinion as to whether or not any cash was paid to the Village Collector in this transaction of January 12, 1942 in connection with a redemption from forfeiture?

Mr. Blunt: Yes sir.

Mr. Short What is that opinion?

Mr. Lyon: I object to the question. The witness isn't entitled to give an opinion. He is entitled to testify to the facts as he found them from the records out there.

Mr. Short: Master, the question goes to this point. The foundation for this is his testimony that no record of the Village Collector showed any receipt of cash or anything on January 12, 1942, the date this receipt bears, which is really the earliest date shown on the duplicate original receipted tax bill. The Collector purports to have received a collection a year or so later, September, 1943. It is better than a year and a half later. Now, my question goes as to whether

he has an opinion if in this particular instance the Village Collector received any cash in 1942. He stated he has an opinion on that, and I would like to know what that opinion is.

Mr. Lyon: I object to him giving an opinion. If he found any facts let him testify on the facts, but not what his opinion is.

Mr. Short: He testified the Village Collector hasn't recorded any payment on the date that this receipt bears, even though the receipt itself says that he received that amount of money on January 12, 1942.

The Master: Well, any opinion he might express would have to be based on some facts which he determined from his examination, and whatever those facts are ought to be stated in connection with his opinion. Objection overruled. (Tr. 785.)

* * * * *

Mr. Blunt: For the purpose of simplification, we have computed interest at the rate of five per cent per annum on the funds which we have considered were unlawfully withheld. * * *

Mr. Lyon: I move to strike out all that part of the answer in which the witness presumes to decide what is and what is not an unlawful collection or an unlawful withholding.

Mr. Short: I think the witness has testified to what the plaintiff's contention is. We have been through that before.

The Master: The word "unlawful" will be a conclusion of the witness. (Tr. 849-850.)

* * * * *

Mr. Blunt: * * * The reallocation of such transactions would obviously be of no value in computing the interest on funds unlawfully withheld.

Mr. Lyon: I move to strike out so much of that answer as is what this witness believes to be unlawful.

Mr. Short: I think that is subject to the same ruling Your Honor made.

Mr. Lyon: The witness has no right to give any of his own beliefs as to what the law is. If the plaintiff wishes to make a contention of one sort or another

that is a matter for argument and not a matter for testimony by a witness.

The Master: The same ruling as before; wherever the word "unlawful" is used it will be considered as only the contention of the plaintiff in this case. (Tr. 851.)

* * * * *

Mr. Lyon: The question is, Mr. Blunt, whether that (column 5, exhibit A-2) agrees with the bonds as shown by the Village records to be outstanding. * * *

Mr. Blunt: No, it does not include other securities that are also issued and outstanding that are not subject to proration benefits.

Mr. Lyon: When you say it does not include other securities that are also issued and outstanding that are not subject to proration benefit, that is your conclusion, is it?

Mr. Blunt: Yes sir. That is my opinion. (Tr. 881-882.)

* * * * *

Mr. Wooster: I want to find out if your theory is the same on this (plaintiff's last exhibits) as the other one. You testified you were not there and you don't know whether they were paid in cash, but you assumed it. Is that a correct statement of your testimony on the first exhibit?

Mr. Blunt: I assumed that after an examination of the records.

Mr. Wooster: And are you continuing with the same assumption here?

Mr. Blunt: Yes sir. (Tr. 933.)

* * * * *

Mr. Blunt gave it as his *opinion* that all of the bills shown in the municipal records as paid with securities were first paid in cash and the securities later substituted, except in two transactions which were "acceptable" to him. Early in his testimony he admitted that he "resolved all presumptions, obscurities, and doubts adversely against" the village, which in his opinion was a trustee,

"and treated the amounts shown by the Village Collector's duplicate receipted tax bills as receipts of cash." (Tr. 338.)

The following portion of the transcript shows how completely Mr. Blunt's opinions were a matter of presumption and assumption:

> The Master: Do I understand from your answer to the question that Mr. Lyon asked that that sum excludes absolutely all collections where bonds were tendered?
>
> Mr. Blunt: No, it does not. It includes all such transactions.
>
> The Master: And you have treated the bonds, therefore, as cash, equivalent to cash?
>
> Mr. Blunt: We have treated the duplicate original receipted tax bills that are stamped "Paid" as though they were the equivalent of cash, or presumed that they were paid in cash except the two instances which we could identify.
>
> If I may explain, sir, the figures appearing in column 4 of plaintiff's exhibit number 2 are actually the total principal collections. It does not purport to be a historical account of any bonds which may have been cashed by any kind of a transaction. It is merely an accurate record of our analysis of the duplicate original receipted tax bills marked "Paid" by the Village Collector, plus the collections which the Village Treasurer received from the County Collector and the County Clerk.
>
> The Master: And not including the bonds where they were tendered?
>
> Mr. Short: Master, I don't like the word "tendered".
>
> The Master: Where they were tendered and accepted? You have two instances, you have testified, where that has been done?
>
> Mr. Blunt: Yes, sir.
>
> The Master: Would you say as to all other bond transactions where bonds have been tendered in payment of those assessments that there was not a legitimate transaction in any of the remaining bond trans-

actions? Couldn't there have been a re-collection by tender of bond not only in one instance but in numerous instances where the tax receipts or bills had both stamps on them so you could not tell from looking at the bill whether it was paid in bonds or paid in cash. You have assumed it in those instances each time that they were paid in cash?

Mr. Blunt: Yes, purely by presumption, on many so-called liquidation transactions it might have been possible for some property owner to legitimately tender a bond in payment of his special assessment bill, but those transactions are so commingled with other trust accounts that we are unable to identify which security is applicable to which property owner's bill. The bill is not marked to show or identify what security was used. Neither is the cancelled bond marked to show which bill that bond purportedly paid, and in the absence of responsible information out there to show that there were any other legitimate tender or acceptance of securities other than the two which I testified to, I considered them as cash transactions. I likewise observed identification between the bond and the property owner in the two transactions I testified to, and I presumed that it couldn't be anything other than an acceptable transaction. I think that was a presumption, but it was a reasonable presumption.

Mr. Blunt not only expressed his legal opinions in his oral testimony, but also set up the figures in his accounting under such headings as "Acceptable Liquidations", "Unacceptable Liquidations" and "Improperly Issued Obligations". (Pl. Ex. Bk. 18 & 20.) These headings obviously were not taken from the village records, but constituted classifications according to his opinion.

Mr. Blunt went far beyond the province of an accountant which is to examine complicated books and records and prepare by arithmetical computation and calculation the proper footings to figures involved.

The case of *Continental Casualty Co.* v. *First National Bank of Temple,* 116 F. 2nd 885, is in point. It was decided by the Court of Appeals for the fifth circuit, and certiorari denied by this Court. It involved the liability of the surety company upon alleged defalcations of a bonded employee of the bank. The plaintiff, as in the case at bar, relied upon the testimony of an accountant. He testified to his examination of the books and records and was permitted to state that in his opinion the assets of the bank were reduced by the amount of certain deposit slips withheld by the bonded employee. On appeal by the bonding company from judgment for the bank the judgment was reversed in an opinion which contains the following:

> "It is our view that the experts should have been restricted to giving testimony as to what was actually done in each instance as revealed by the records and to explaining any technical matter involved in banking or accounting. It should have been left to the jury to determine the ultimate question as to whether any of the assets of the bank had or had not been diminished in reaching the final conclusions as to the liability of the defendant. This is especially important where the claim is based upon charges of fraud and dishonesty, which are never presumed and which the plaintiff must establish by a fair preponderance of the evidence and not leave to mere speculation and guess."

In the case of *Smythe's Estate* v. *Evans,* 209 Ill. 376, 388, 70 N. E. 906, 911, the Court in discussing the competency of opinion evidence by an accountant said:

> "It is also proper, for the convenience of the jury, to take the evidence of a bookkeeper, accountant or other person skilled in the work of that character, to show the footing of a column of figures, or to show the result of any calculation from a complicated set of figures which cannot be readily carried in mind by the jury, where the calculation is purely mathematical.

> In making these figures from these books the only thing that it was proper to show by Flyton was the footings or other results obtained, in figures. His statement based upon his examination of the books, that the profits were a certain sum, is a conclusion, and inadmissible" * * *.

The Court of Appeals at page 8 of its opinion stresses the duty of the District Court under the Federal Rules of Civil Procedure to accept the master's findings of fact unless clearly erroneous. This is a misconception of what the District Court did. The figures in the master's report came entirely from the Blunt exhibits, dollar for dollar and penny for penny. The master did not make a single independent calculation. The respondent's whole case thus rests on the testimony given and the audit prepared by Mr. Blunt. The District Court held, not as a matter of fact, but as a matter of law, that neither the Blunt testimony nor his exhibits should have been admitted.

The question is not a matter of fact, dealing with the weight of testimony. The question is a matter of law, dealing with the competency of the only evidence to disprove the accuracy of the municipal records and to prove the fraud which the respondent charged.

This Court will examine into the competency of evidence as in the case of *McCandless* v. *United States*, 298 U. S. 342, in which this Court said:

> "* * * an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial."

The Blunt testimony and exhibits, even though the Court of Appeals could "perceive no infirmity" in them, were definitely incompetent and prejudicial to the petitioner.

III.

THE RELIEF SOUGHT BY THE PETITIONER'S CROSS APPEAL SHOULD HAVE BEEN GRANTED.

The authorities cited in the first point of this petition establish the rule that the limited liability of a municipality to pay special assessment bonds out of special assessment collections cannot be converted into a general liability except by affirmative proof that the collections have been made. The cases there cited show that a municipality cannot assume such a liability even by official action. It certainly follows that an "admission" by counsel, made at the first hearing before the accounts had been prepared, cannot create such liability if it does not in fact exist. *Village of Hartford* v. *First National Bank of Wood River*, 307 Ill. App. 447, 30 N. E. 2d 524.

The subsequent accounting of cash collections showed that the respondent had actually received more than its share. (Tr. 87-93 and Defts. Ex. Bk. 43.) The District Court judgment was therefore in error on this point and in the assessment of costs against the petitioner.

CONCLUSION.

The decision of the Court of Appeals in this case is contrary to the express terms of a statute which has been in force for over fifty years and contrary to every prior decision construing that statute. By the "trust accounting" theory the Court of Appeals has created an "event" in which a municipality can be held generally liable for money which it has not collected merely through the failure of the village officers to keep proper records and to explain any errors or omissions found therein. Every municipality in Illinois is vitally affected.

Even if the "trust accounting" theory were sound the decision is erroneous in that it is based solely upon opinion evidence by an accountant which is clearly incompetent.

We most earnestly urge that the Court grant its writ of certiorari in this case.

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